No. 847 49

In the Supreme Court of the United States

OCTOBER TERM, 1943

THE WESTERN UNION TELEGRAPH COMPANY, PETITIONER

v.

KATHARINE F. LENROOT, CHIEF OF THE CHILDREN'S BUREAU, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the district court (R. 24–39) is reported in 52 F. Supp. 142. The opinion of the circuit court of appeals (R. 46–51) is not yet reported.

QUESTION PRESENTED

Whether petitioner ships in commerce "goods" "produced" in establishments in or about which oppressive child labor is employed, within the meaning of the Fair Labor Standards Act of 1938.

STATUTE INVOLVED

Sections 3 (i) and 12 (a) of the Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U. S. C., sec. 201, which are the statutory provisions chiefly involved, read as follows:

> SEC. 3. As used in this Act—
>
> * * * * *
>
> (i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.
>
> * * * * *
>
> (j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.
>
> * * * * *
>
> SEC. 12. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, no producer, manufacturer, or dealer shall ship or deliver for

shipment in commerce any goods produced in an establishment situated in the United States in or about which within thirty days prior to the removal of such goods therefrom any oppressive child labor has been employed: *Provided,* That a prosecution and conviction of a defendant for the shipment or delivery for shipment of any goods under the conditions herein prohibited shall be a bar to any further prosecution against the same defendant for shipments or deliveries for shipment of any such goods before the beginning of said prosecution.

* * * * *

STATEMENT

This case arises upon a complaint filed by respondent, the Chief of the Children's Bureau, United States Department of Labor, to restrain petitioner from violating Sections 12 (a) and 15 (a) (4) of the Fair Labor Standards Act. The facts, which were stipulated (R. 9–16), may be summarized as follows:

1. *Business of Defendant.*—Petitioner is engaged in the transmission and delivery of telegraph messages throughout the United States and in foreign countries (R. 9). It operates some 3,100 public telegraph offices located in large and small communities at which messages are received from the public over-the-counter, by telephone, by telegraphic tie lines, and from petitioner's messengers who call for messages at its patrons' request (R. 9–10).

In the public offices petitioner's employees do considerable work on the messages before transmitting them. They write on the appropriate telegraph blanks all messages received by telephone and some received over-the-counter (R. 10). Frequently, petitioner's employees correct misspelled or illegible words, combine or separate words where necessary, and, with the senders' permission, clarify or shorten messages by changing, adding, or subtracting words (R. 11). Symbols are placed on all messages to show the date and time of filing, the number of words, the class of telegraph service and the charge (R. 11).

The messages are then sent to a message center in the same community for transmission to their destination. In many instances an employee in the public office transforms the written message into electric impulses which flow through a telegraphic circuit connecting the public office with the center and cause a teleprinter in the center to reprint the message. (R. 11–12.) In other public offices the original message with the notations added by petitioner's employees is itself placed in a carrier capsule which is delivered to the message center through a pneumatic tube (R. 11–12).

At the message center the messages are routed by writing on each form the name or symbol of the proper outgoing circuit, and they are then dispatched to the appropriate message centers in other cities by means of teleprinter, multiplex

printer or Morse code (R. 12–14). From the second center the messages are transmitted to public offices for delivery and delivery is made to the addresses, usually by messengers employed in the public offices (R. 15). The carriage is then complete.

A substantial proportion of the telegraph messages originating at each of the offices of petitioner is transmitted by petitioner in interstate commerce before delivery (R. 15). In most instances the movement across State lines occurs during transmission between message centers, but some messages originating at a public office near State lines move across a State line during their transmission to or from a message center (R. 15).

2. *Oppressive child labor.*—Approximately 15,000 telegraph messengers are employed in petitioner's public office to collect and deliver telegraph messages (R. 10). The large majority use bicycles in the performance of their work (R. 10) but petitioner also employs messengers to collect and deliver messages on foot and in motor vehicles (R. 10).

Since January 1, 1941, petitioner has employed as telegraph messengers in its public offices many minors under 16 years of age and also, since January 1, 1942, has employed many minors between 16 and 18 years of age as drivers of motor vehicles (R. 15–16). Such employment constitutes oppressive child labor within the meaning of Section 3 (l) of the Act and Child Labor Order

No. 2 issued thereunder (Title 29, c. 4, Code of Federal Regulations, 1939 Supp., Part 422, sec. 422.2).

3. *Proceedings below.*—The district court ruled that petitioner was violating Sections 12 (a) and 15 (a) (4) of the Act by shipping in interstate commerce goods produced in establishments in or about which oppressive child labor was employed (R. 24–39). Accordingly, the district court entered a judgment restraining petitioner from shipping in interstate commerce telegraph messages produced by petitioner in any of its public offices in or about which oppressive child labor had been employed within 30 days of such transmission (R. 40–41). On appeal, the Circuit Court of Appeals for the Second Circuit affirmed the judgment of the district court (R. 51).

ARGUMENT

Section 12 (a) of the Fair Labor Standards Act provides:

> * * * no producer, manufacturer, or dealer shall ship or deliver for shipment in commerce any goods produced in an establishment situated in the United States in or about which * * * oppressive child labor has been employed * * *.

Admittedly, petitioner's conduct constitutes "oppressive child labor" within the meaning of Section 3 (l), if the Act applies to it. It is not denied that the public offices are establishments.

The only issue presented to the courts below was whether petitioner is a "producer" within Section 12 (a) and "ships" in commerce "any goods." Messages containing ideas, orders and intelligence are composed, handled and worked on in petitioner's public offices; there they are transformed into electric impulses and conveyed to other States. Both courts below, although they conceded that telegraph messages are not "goods" and are not "produced" by petitioner in the colloquial sense of those words, held without dissent that such messages are "goods" and such handling is "production" within the express statutory definitions that Congress supplied. We submit that this decision is plainly correct.

1. (a) As a matter of textual analysis it is clear that Section 12 (a) applies to petitioner's activities. The colloquial meaning of the words must give way to the statutory definitions. *Fox* v. *Standard Oil Co.*, 294 U. S. 87. Section 3 (i) provides that as used in the Act—

> "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character * * *.

A message may be a "subject of commerce." Long prior to the enactment of the Act, this Court had recognized that news, ideas and intelligence move in interstate commerce no less than tangible articles of trade. *Gibbons* v. *Ogden*,

9 Wheat. 1, 229–230 (per Mr. Justice Johnson); *International Textbook Co.* v. *Pigg*, 217 U. S. 91, 106–107; *Indiana Farmer's Guide Co.* v. *Prairie Co.*, 293 U. S. 268, 276; *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103, 128–129. And in *Western Union Telegraph Co.* v. *Pendleton*, 122 U. S. 347, 356, the Court had held that the "ideas, wishes, orders, and intelligence" embodied in messages are the "subjects" of the interstate commerce in which petitioner is engaged. As the court below suggested, these decisions do not demonstrate that the term "subjects of commerce" was used in the Act to include messages. But the decisions do show that the term is appropriate for that purpose, and Section 3 (i) itself shows that here the term was used in its broadest sense to embrace everything that might be a subject of interstate commerce. This is manifest not only from the sweep of the words—it would be difficult to conceive a broader definition—but also from the concluding phrase "subjects of commerce *of any character*,"[1] which expressly negatives the suggestion that only some kinds of subjects of commerce are included.

In the lower courts petitioner argued that messages are not "goods" because they are intangible. The dichotomy "articles or subjects" indicates, however, that the draughtsman had the contrast, tangible or intangible, squarely in mind; and the

[1] Italics supplied.

action of the Senate Committee in adding the word "subjects" to a definition which already included all the other descriptive nouns now in Section 3 (i) can be attributed only to the desire of the Committee to include every subject of commerce which Congress had power to reach, whether tangible or not. S. 2475, Committee Print to accompany S. Rept. 884, 75th Cong. 1st Sess.

Petitioner, therefore, has abandoned the contention that the definition covers only tangible goods, but now contends for the first time that its scope is limited to goods "produced, transported and sold to be consumed, in competition or potential competition with other sales of similar products" (Pet. 15). This new contention is utterly lacking in merit for three reasons. First, it is well settled that the subjects of interstate commerce are not limited to articles of commercial competition. See *Walling* v. *Haile Gold Mines*, 136 F. (2) 102 (C. C. A. 4) and cases cited. Second, it is a matter of common knowledge that petitioner does in fact carry messages containing reports, news and other intelligences which are the subject of trade. Third, the words of Section 3 (i) and its legislative history show that no limitation on the word "subjects" of commerce was intended (see p. 8, *supra*).

(b). The Act also makes clear that petitioner "produces" goods within the meaning of Section 12 (a). As the courts have repeatedly recog-

nized,[2] the Act effectively expands the term "produced" beyond its normal connotations; Section 3 (j) provides:

> "Produced" means produced, manufactured, mined, handled, or in any other manner worked on * * *.

Petitioner's entire argument on this point is devoted only to showing that "handling" by a carrier—transportation—does not constitute "production" (Pet. 15–16). We may assume the correctness of this interpretation, as did the court below. Petitioner does not merely transport messages. Petitioner's employees in its public offices aid in the composition of the messages, and mark and handle the forms on which they are written. They transform sounds into writing, writing into electric impulses, and impulses back into writing. To assist in the composition of a message and to transform it in order to send it rapidly is certainly to "work on" the message and even is to "produce" it in the ordinary sense, whether the message is regarded as the intelligence or the media in

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[2] *Bracey* v. *Luray*, 138 F. (2d) 8 (C. C. A. 4); *Fleming* v. *Kenton Loose Leaf Tobacco Warehouse Co.*, 41 F. Supp. 255 (E. D. Ky.); *Fleming* v. *Atlantic Co.*, 40 F. Supp. 654 (N. D. Ga.), affirmed, *Atlantic Co.* v. *Walling*, 131 F. (2d) 518 (C. C. A. 5). See also *Rahgo* v. *Cities Service Oil Co.*, 177 Misc. 1059, 33 N. Y. S. (2d) 42 (Munic. Ct. N. Y. City, 1942); *Campbell* v. *Mandel Auto Parts Corp.*, 31 N. Y. S. (2d) 656 (Sup. Ct. N. Y., N. Y. Co., 1941); *Gaskin* v. *Clell Coleman and Sons*, 5 Wage Hour Rept. 581, 584 (C. C. Ky. Mercer Co., 1942). Contra, *James V. Reuter, Inc.* v. *Walling*, 137

which it is conveyed.[3] Likewise, to mark a written message to show the charges and time of transmittal and receipt is to "handle" it. The messages, therefore, are "produced" in petitioner's establishments by its employees and the petitioner is a "producer" within the meaning of the Act.

(c) It is equally clear that the messages are "shipped" by petitioner within the meaning of Section 12. The verb "ship" is an imprecise word meaning little more than "send." In its purest sense, it is true, it means to put aboard a vessel, but plainly that is not the meaning here. Beyond that "ship" means simply to transport or convey, or to cause to be transported or conveyed. Cf. Webster's New International Dictionary (2d ed.). Certainly, petitioner "conveys" messages, and it does no violence to language to say, as the Court has done, that it "transports" them. *Western Union Tel. Co.* v. *Texas*, 105 U. S. 460, 464. The word takes its color here from the express definition of "goods"; and since the messages are

F. (2d) 315 (C. C. A. 5), certiorari granted November 22, 1943, and judgment vacated April 10, 1944, No. 436, this Term.

[3] There is, of course, no difficulty of usage in speaking of a message as a thing produced. Compare, for example, *United States* v. *The Associated Press*, no. 19-163, S. D. N. Y., Oct. 6, 1943; *International News Service* v. *Associated Press*, 248 U. S. 215, 253, 254 (Mr. Justice Brandeis, dissenting). And the Act itself uses the word with reference to the child labor provisions to cover the production of intangible goods. Section 13 (c) provides:

"The provisions of section 12 relating to child labor shall not apply with respect * * * to any child employed as an actor in * * * theatrical productions."

"goods," there can be no doubt that petitioner "ships" them in interstate commerce when its employees send them across State lines.

2. The decision below also gives proper effect to the legislative history of Section 12 (a). When the bill that became the Fair Labor Standards Act was introduced, there was general agreement that Congress should eliminate child labor wherever federal power would reach. In his message to Congress, the President condemned without limitation the employment of children: "A self-supporting and self-respecting democracy can plead no justification for the existence of child labor * * *" (H. Doc. 255, 75th Cong., 1st sess., p. 2). In the hearings, the testimony developed a program of abolishing child labor and its products from the national sphere by statute and from the intrastate realm by pressing the proposed constitutional amendment. *Joint Hearings before the Senate Committee on Education and Labor and the House Committee on Labor on S. 2475 and H. R. 7200*, pp. 390–391, 396–402. On the floor, it was said without contradiction that the Act would eliminate child labor from industry. E. g. 83 Cong. Rec. 9263–9264. The problem confronting both the President and Congress was not whether or how far child labor should be eliminated from industries subject to federal regulation; it was, how far does federal power reach and how can it be used most effectively to abolish the evil. Common sense repels the suggestion that

Congress intended to eliminate the employment of children from the manufacturing of goods for commerce—then of doubtful constitutionality (*Hammer* v. *Dagenhart*, 247 U. S. 251)—and to leave unimpaired the equal evil of child labor in those activities constituting interstate commerce proper which fall within the broad statutory definition of production of goods—activities peculiarly within the competence of Congress to regulate.

The course of the bill through Congress is consistent with this conclusion. Prior to the conference report every print except one prohibited the employment of oppressive child labor in commerce—more than twenty prints including reports by the House and Senate committees. There was no such provision, it is true, in the bill in the form in which it first passed the Senate, but this exception is not material for present purposes because the Senate bill proceeded on the theory, later rejected, that Congress should not set its own standards for child labor but should merely supplement State laws by prohibiting interstate sales of goods made by children under conditions outlawed by the State of destination (81 Cong. Rec. 7949–7951).[4] Opinion was apparently unanimous that if Congress was to set a single national minimum stand-

[4] These provisions were based on the theory of the convict-made goods Act sustained in *Ky. Whip & Collar Co.* v. *I. C. R. Co.*, 299 U. S. 334.

ard it should do it both for the production of goods for commerce and for commerce itself.

The child labor provisions of the Senate bill, as we have said, proceeded on the theory that Congress should merely supplement State laws. The House bill, on the contrary, established minimum national standards for establishments engaged in production for commerce, and for employment in commerce in industries affecting commerce. Section 10 (a) contained the provisions that became Section 12 (a) of the Act. Section 10 (b) provided:

> No employer engaged in commerce in any industry affecting commerce shall employ any employee under any oppressive child labor condition.

At that time, therefore, both Section 10 (a) and 10 (b) covered petitioner.

The first issue before the Conference Committee was whether to accept the theory of the Senate bill or that of the House. The provisions of the House bill were supported by the chief proponents of child labor legislation on the ground that child labor would be eliminated more quickly and enforcement made easier if an act establishing a national minimum age standard were adopted rather than a law based on conflicting State requirements.[5] Those provisions,

[5] Joint hearings before the Senate Committee on Education and Labor and the House Committee on Labor on S. 2475 and H. R. 7200. Testimony of Mrs. Larue Brown,

Sections 3 (m) and 10 (a) of the House bill, were made the basis for the conference report and are now Sections 3 (l) and 12 (a) of the Act. Accordingly, there is no merit in petitioner's argument—on which its petition for certiorari is pitched—that Congress did not establish any national policy concerning child labor. Congress did establish such a standard; it rejected the entire theory of the Senate bill. The Conference Committee expressly stated that the conference agreement, with one exception presently to be noted, "adopts the child labor provisions of the House amendment" (see p. 16 *infra*).

The second issue before the Conference Committee affecting the child labor provisions was common to the entire bill. The theory of the House bill, running through the wage, the hour and the child labor provisions equally, was that the legislation should apply to employment in commerce in any industry found by the Secretary of Labor to be an industry "affecting commerce" according to criteria supplied by Section 6 of the bill. The Conference Committee, however, decided to eliminate all attempts to regulate conditions of employment in commerce in industries found by the Secretary of Labor to be industries

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representing the National League of Women Voters, pp. 390–391, of Mr. Courtenay Dinwiddie, General Secretary, National Child Labor Committee, pp. 399–400; statements of the National Federation of Business and Professional Women's Clubs, Inc., by Mrs. Opal D. David, p. 395.

affecting commerce. Its purpose was to eliminate the broad delegation of administrative discretion to determine the scope of the regulation. The change was made first in the wage and hour provisions, which became Sections 6 and 7, and they were confined to employment "in commerce" or "in the production of goods for commerce." The Conference Committee then struck out from the child labor provisions of the House bill subsection 10 (b) quoted above. It did so for the same reason that it limited the wage and hour provisions. The Conference Report states (H. Rept. 2738, 75th Cong., 3d sess., p. 32):

> Section 12 of the conference agreement adopts the child labor provisions of the House amendment, with one exception. In view of the omission from the conference agreement of the principle of section 6 of the House amendment [the regulation of industries found by the Secretary to affect commerce], subsection (b) of section 10 of the House amendment has been omitted.

In other words the only change intended to be made in the House bill was to omit the proposed grant of power to the Secretary to determine and regulate the industries affecting commerce. In all other respects the single national standard proposed in the House bill prevailed.

There is no clear explanation of the Committee's failure to put back into the conference agreement some express regulation of child labor in

commerce as such. It may have been inadvertence. More probably it was the belief that the statutory definitions of "goods" and "produced" coupled with the establishment test[6] were themselves broad enough to cover commerce itself in every important case, and that enforcement would be simplified if coverage were tested by whether the "establishment" was engaged in the production of "goods," under the unusually broad statutory definitions, rather than by an inquiry into the character of each individual's employment.[7] But whatever the explanation, the history is clear that the omission of such a provision was not the result of a deliberate intent not to regulate the employment of child labor in interstate commerce.

In view of the beneficent purposes of the Act and the evident intention of Congress, the courts should not now narrow the statutory definitions of "produced" and "goods" in order to render Section 12 (a) inapplicable to establishments nor-

[6] It should be noted that the child labor provisions determine coverage on an establishment basis rather than on the basis of the employment of each individual employee. This contrasts with the test set up in the wage and hour provisions and is another indication of the broad scope intended in Section 12.

[7] Hearings before the Committee on Interstate Commerce, U. S. Senate, 75th Cong., 1st sess., on S. 592, S. 1976, S. 2068, S. 2226, and S. 2345, May 12, 18, 20, 1937, comment of Senator Barkley, P. 128; testimony of Mr. Courtenay Dinwiddie, General Secretary, National Child Labor Committee, pp. 98–99.

mally regarded as engaged in commerce rather than in the production of goods. On the contrary, the occasion requires that the words be given the full scope of the definitions which Congress supplied, in order to gain the end which Congress believed it had achieved. This is not to extend the Act by implication; as we have shown above (pp. 7–11, *supra*), our construction gives the definitions only the natural and established meaning of their words.

3. Petitioner dwells at some length on the form of the district court's decree. The decree (R. 41) restrains it from—

> Transmitting in interstate commerce * * * telegraph or other messages or any other goods produced by or for defendant * * * in any establishment * * * in or about which within thirty (30) days prior to the transmission or other removal of such messages or other goods therefrom, there shall have been employed * * * any oppressive child labor * * *.

Petitioner states that this is an "injunction which neither the plaintiff nor the court could possibly permit to be obeyed" (Pet. 7, cf. Pet. 3).

We cannot agree. Except for the initial 30-day period, compliance with the injunction will require petitioner to do nothing except cease the oppressive employment of children whom Congress has declared too young to work (Section 3 (l)). In the future, petitioner may protect itself against

any unwitting violations of the Act or the decree by requiring all minors to present certificates of age (Section 3 (l)). It may even be that the 30-day period will present no problem, for some time will elapse before the mandates go down in which petitioner may discharge all underage children in its employ and the 30-day period may then elapse before the decree becomes effective. But if the period intervening before the decree becomes effective is not long enough to enable petitioner to make a reasonable adjustment of its employment practices, then either the circuit court of appeals or the district court may properly stay the injunction further in order to permit the transmission of messages until petitioner has a reasonable time to comply. See *Standard Oil Co.* v. *United States,* 221 U. S. 1, 81; *United States* v. *American Tobacco Co.,* 221 U. S. 106, 187–188. Petitioner's fears are therefore unreal. There need be no interruption of its business. The Government expects, and we believe both courts below expected, that petitioner will comply with the Act and with the injunction once its obligations have been finally determined.

CONCLUSION

There can be no doubt of the importance of petitioner's operations or of the significance to it of the question presented in the instant case. Moreover, the interpretation of the definitions of

"goods" and "produced" has considerable importance in the administration of the Act. But, although for these reasons we do not urge that the petition for certiorari should be denied, it is our opinion that the decision below does not require review by this Court. For the reasons that we have stated, it is plainly correct. Since the petitioner is the only company directly affected, the decision of the circuit court of appeals will lay the issue at rest. Consequently the petition for certiorari may properly be denied.

Respectfully submitted.

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APRIL 1944.

U. S. GOVERNMENT PRINTING OFFICE 1944